

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION**

APPLETON PAPERS INC. and	)	
NCR CORPORATION,	)	
	)	
Plaintiffs,	)	
v.	)	No. 08-CV-16-WCG
	)	
GEORGE A. WHITING PAPER COMPANY,	)	
ET AL.,	)	
Defendants.	)	

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NCR CORPORATION,	)	
	)	
Plaintiff,	)	
v.	)	No. 08-CV-0895-WCG
	)	
KIMBERLY-CLARK CORPORATION,	)	
ET AL.,	)	
Defendants.	)	

**PLAINTIFFS' STATEMENT OF ADDITIONAL FACTS OPPOSING  
DEFENDANT CITY OF GREEN BAY AND  
DEFENDANT BROWN COUNTY'S MOTIONS FOR SUMMARY JUDGMENT**

Pursuant to Civil L.R. 56(b)(2)(B)(ii) of the United States District Court for the Eastern District of Wisconsin, Plaintiffs Appleton Papers Inc. and NCR Corporation respectfully submit the following additional facts that require the denial of summary judgment, in support of their Memorandum of Law in Opposition to City of Green Bay and Brown County's Summary Judgment Motions.

**I. BACKGROUND**

1. Renard Island and Bayport are located in or adjacent to Operable Unit 5 ("OU5") of the Lower Fox River. Declaration of Kathleen L. Roach in Support of Plaintiffs' May 3, 2010, filings ("KLR Decl.") Ex. 35 [Record of Decision Amendment, June 2007, pp. 9, 16-17, 104-105].

2. The OU5 remedy is 30 years of monitoring, unless improving conditions allow for an earlier completion of the monitoring program. KLR Decl. Ex. 38 [Appendix I, Lower Fox River Remedial Report, Long-Term Monitoring Plan, December 2009, p. 43].

3. PCB releases have been documented at Bayport and Renard Island. KLR Decl. Ex. 30 [WDNR Preliminary Green Bay Mass Balance Groundwater Monitoring Report (An Assessment of the Bayshore Landfills), January 1990, Dkt. 870-3, pp. 8-9]; KLR Decl. Ex. 42 [Final Screening Site Inspection Report for the Bayport Industrial Park, 9/23/1993, pp. 44]; KLR Decl. Ex. 44 [Final Environmental Impact Statement, Green Bay Harbor, Wisconsin, Confined Disposal Facility, July 1985, at EIS-G-37]; KLR Decl. Ex. 3 [April 30, 2010 Declaration of D. Hayes, ¶13].

4. “Historical and continuing PCB losses” from Bayport and Renard Island “are a contributing reason for the extensive long-term monitoring requirements within Green Bay.” KLR Decl. Ex. 3 [April 30, 2010 Declaration of D. Hayes, ¶14].

*A. Bayport Disposal Facility*

5. The Bayport Disposal Facility (“Bayport”), a former wetland, is located along the shore of Green Bay, immediately west of the mouth of the Lower Fox River. KLR Decl. Ex. 30 [WDNR Preliminary Green Bay Mass Balance Groundwater Monitoring Report, January 1990, at NCR-FOX-0097406]; KLR Decl. Ex. 31 [Final Environmental Impact Statement relating to Operation, Maintenance, and Dredging Material Disposal at Green Bay Harbor, Army Corps, November 1977, at p. 2].

6. The City of Green Bay and Brown County constructed a perimeter dike around Bayport. Dkt. 870-1, p. 3.

7. The City of Green Bay owned Bayport until 1990, when Brown County purchased the majority of the facility. Dkt, 870-1, p. 2, 4. After the 1990 sale, Green Bay retained ownership of portions of Bayport that were not otherwise sold to private industry. *Id.*

8. Beginning in the late 1950s, Bayport accepted Lower Fox River Site dredged materials for disposal. KLR Decl. Ex. 30 [WDNR Preliminary Green Bay Mass Balance Groundwater Monitoring Report, January 1990, at NCR-FOX-0097406].

9. Between 1965 and 1998 more than 10 million cubic yards of Lower Fox River dredged materials were disposed of at Bayport. KLR Decl. Ex. 32 [Tech Memo 2g, pp. 25-29, 33 (API-GE009866)].

10. The City of Green Bay was responsible for providing an “approved and constructed disposal facility” at Bayport. Dkt. 870-2, p. 37.

*B. Renard Island*

11. In 1978 construction began on Renard Island, a kidney-shaped island located in the bay of Green Bay, east of the mouth of the Lower Fox River. KLR Decl. Ex. 33 [Ten-Year Dredged Material Disposal Plan for Lower Green Bay, Bay-Lake Regional Planning Comm’n, 1983, GB-DP0008638 at p. 8727]. Construction was completed in 1979. *Id.*

12. Between 1978 and 1996, more than 2.7 million cubic yards of Lower Fox River dredged materials were dumped at Renard Island. KLR Decl. Ex. 32 [Tech Memo 2g, pp. 24-29, p. 33 (API-GE009866)].

13. The United States paid for construction of Renard Island, while “the local sponsor, Brown County,” was required to furnish the site, rights-of-way and future maintenance.

KLR Decl. Ex. 31 [Final Environmental Impact Statement relating to Operation, Maintenance, and Dredging Material Disposal at Green Bay Harbor, Army Corps, November 1977, p. 1-11].

14. The Corps explained that “Brown County will retain the title to the filled confined disposal facility, any granted easements or rights-of-way, and must maintain the filled facility in a manner which the Secretary of the Army determines to be satisfactory.” KLR Decl. Ex. 31 [Final Environmental Impact Statement relating to Operation, Maintenance, and Dredging Material Disposal at Green Bay Harbor, Army Corps, November 1977, p. 1-11].

15. A proposed expansion of Renard Island in the 1980s had provisions for the Corps to pay for construction, and for Brown County to take responsibility for operation and maintenance costs. KLR Decl. Ex. 34 [Lower Green Bay Remedial Plan, February 1988, GPFOX00089127].

16. “[A]ppropriate closure” of Renard Island, including proper capping, monitoring and maintenance, are the responsibility of the Corps and Brown County. KLR Decl. Ex. 35 [Record of Decision Amendment, Operable Unit 2 (Deposit DD), Operable Unit 3, Operable Unit 4 and Operable Unit 5 (River Mouth), June 2007, p. 104)].

17. In 2008, Brown County announced it “will take ownership of the island and its long-term maintenance responsibilities” upon completion of closure activities. KLR Decl. Ex. 36 [Brown County Port and Solid Waste Department news release, June 5, 2008].

18. As recently as February 2010, a local newspaper reported that the City of Green Bay “is interested in taking ownership of the island from Brown County.” KLR Decl. Ex. 37

[Press-Gazette, City of Green Bay Contests Army Corps' Proposed Location of Renard Isle Causeway, Feb. 8, 2010].

**II. THE CITY OF GREEN BAY AND BROWN COUNTY KNEW BY 1966 THAT THE LOWER FOX RIVER SEDIMENTS WERE GENERALLY CONTAMINATED WITH UNDESIRABLE MATERIALS.**

19. By the mid-1960s, the City of Green Bay and Brown County knew that the Lower Fox River Site sediments were generally contaminated with pollutants. Dkt. 870-2, pp. 52-54.

20. In an April 1966 letter to the Brown County Port Director, which copied the City of Green Bay's Public Works Director, the Corps noted that certain open-water dumping may not be permissible "because of possible increased pollution" in Green Bay. Dkt. 870-2, pp. 52-54.

21. In 1969, the Federal Water Quality Administration ("FWQA"), the predecessor to the U.S. Environmental Protection Agency ("U.S. EPA"), sampled the Green Bay Harbor Channel. KLR Decl. Ex. 39 [Report on the Degree of Pollution of Bottom Sediments in the Fox River and Green Bay, July 9, 1969, GB-DP0003058, at GB-DP0003181].

22. The 1969 FWQA sampling found that the Lower Fox River sediments were moderately to heavily polluted, and concluded that "[n]one of the sediments in this channel are suitable for disposal in the open waters of Green Bay or Lake Michigan." KLR Decl. Ex. 39 [Report on the Degree of Pollution of Bottom Sediments in the Fox River and Green Bay, July 9, 1969, GB-DP0003058, at GB-DP0003181].

23. In 1971, Green Bay area newspaper articles carried stories relaying the State of Wisconsin's warning to its residents against eating excessive amounts of certain fish due to

potential PCB contamination. KLR Decl. Ex. 40 [10/2/1971 Neenah Menasha Northwestern (APIFOX00054850)]. The articles informed the public that PCBs were used in a variety of products, including manufacture of carbonless copy paper, hydraulic fluids, plastics and plywood. *Id.*

24. The 1972 Interdepartmental Task Force Report on PCBs was well-publicized. Dkt. 660, ¶17 [June 4, 2009 Report of M. Williams].

25. By 1975, at the latest, sampling conducted on behalf of the Corps confirmed that the contamination in the Lower Fox River sediments included PCBs. KLR Decl. Ex. 41 [Laboratory Study of the Release of Pesticide and PCB Materials to the Water Column During Dredging and Disposal Operations, December 1975, p. 19-20, 49, 65].

26. In the mid-1970s, sediment from the bay of Green Bay was sampled for the presence of PCBs as part of an effort to examine the effects of dredging and open-water discharges on the release of PCBs. KLR Decl. Ex. 41 [Laboratory Study of the Release of Pesticide and PCB Materials to the Water Column During Dredging and Disposal Operations, December 1975, p. 20]. The sampling revealed the presence of PCBs similar to both Aroclor 1242 and Aroclor 1254. *Id.*

### **III. DISPOSAL OF LOWER FOX RIVER DREDGED MATERIALS AT THE BAYPORT DISPOSAL FACILITY CAUSED HARM TO THE LOWER FOX RIVER.**

27. The Wisconsin Department of Natural Resources (“WDNR”) has found that Bayport, like Renard Island, was an “older” site that was “not designed to completely isolate dredged materials from the environment.” KLR Decl. Ex. 34 [Lower Green Bay Remedial Action Plan, WDNR, February 1988, GPFOX00089079, at GPFOX00089211].

28. WDNR has also stated that “uncovered contaminated wastes and substantial use by wildlife ... have potential for run-off and for contaminants to move through the food chain into fish and wildlife.” KLR Decl. Ex. 34 [Lower Green Bay Remedial Action Plan, WDNR, February 1988, GPFOX00089079, at GPFOX00089275].

29. Sampling conducted by WDNR at Bayport in the 1990s found “significant PCB and lead detections in the slough flow after the storm event samples”; and that the slough “flows westward ... and then out to the bay.” Dkt. 870-3, p. 8-9.

30. In 1993, WDNR “[o]bserved releases” of Aroclor 1248 in surface water samples taken from the perimeter ditches that drain Bayport. KLR Decl. Ex. 42 [Final Screening Site Inspection Report for the Bayport Industrial Park, 9/23/1993, API-GF048710].

#### **IV. DISPOSAL OF LOWER FOX RIVER DREDGED MATERIALS AT RENARD ISLAND CAUSED HARM TO THE LOWER FOX RIVER.**

31. By the mid-1980s, the federal government recognized that Renard Island “was not designed to be tight and leaks have occurred”; and after one such leak, “[n]o PCB measurements were taken to determine loss of contaminants with these solids.” KLR Decl. Ex. 43 [Final Fish and Wildlife Coordination Act Report on Confined Disposal of Polluted Sediment, Green Bay Harbor, Wisconsin, May 1985, p. 17].

32. EPA was also concerned about PCB releases from Renard Island, given that “the area around the facility supports a diverse fishery” and that “there is a strong potential for bioaccumulation in aquatic life or contaminants that might leak from the disposal facility.” KLR Decl. Ex. 44 [Final Environmental Impact Statement, Green Bay Harbor, Wisconsin, Confined Disposal Facility, July 1985, at EIS-G-7].

33. The WDNR has also noted that Renard Island “had a history of dike leakage, resulting in direct discharge of untreated carriage water,” and that the facility violated its wastewater discharge permit limits for suspended solids. KLR Decl. Ex. 44 [Final Environmental Impact Statement, Green Bay Harbor, Wisconsin, Confined Disposal Facility, July 1985, at EIS-G-36].

34. WDNR found that in 1983 “detectable levels of PCBs” likely were discharged from Renard Island, but that the Corps “had not supplied the Department with information on the actual effluent concentrations of PCBs.” KLR Decl. Ex. 44 [Final Environmental Impact Statement, Green Bay Harbor, Wisconsin, Confined Disposal Facility, July 1985, at EIS-G-37].

Respectfully submitted,

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NCR CORPORATION

/s/ Kathleen L. Roach

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Dated: May 3, 2010

## **CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2010, I electronically filed **Plaintiffs' Statement of Additional Facts in Opposition to Defendant City of Green Bay and Defendant Brown County's Motions for Summary Judgment** using the ECF system, which will send notification of such filing to: Philip Munroe at DiRenzo & Bomier LLC, [pmunroe@direnzollc.com](mailto:pmunroe@direnzollc.com); Scott Fleming at Weiss Berzowski Brady LLP, [sbf@wbb-law.com](mailto:sbf@wbb-law.com); David Mandelbaum at Greenberg Traurig, LLP, [mandelbaumd@gtlaw.com](mailto:mandelbaumd@gtlaw.com); Marc Davies at Greenberg Traurig, LLP, [daviesm@gtlaw.com](mailto:daviesm@gtlaw.com); Sabrina Mizrachi at Greenberg Traurig, LLP, [mizrachis@gtlaw.com](mailto:mizrachis@gtlaw.com); Monique Mooney at Greenberg Traurig, LLP, [mooneym@gtlaw.com](mailto:mooneym@gtlaw.com); Caleb Holmes at Greenberg Traurig, LLP, [holmescc@gtlaw.com](mailto:holmescc@gtlaw.com); Patrick Zaepfel at Kegel Kelin Almy & Grimm, LLP, [zaepfel@kkaglaw.com](mailto:zaepfel@kkaglaw.com); Philip Hunsucker at Hunsucker Goodstein & Nelson PC, [phunsucker@hgnlaw.com](mailto:phunsucker@hgnlaw.com); David Rabbino at Hunsucker Goodstein & Nelson PC, [drabbino@hgnlaw.com](mailto:drabbino@hgnlaw.com); Christopher Dow at Hunsucker Goodstein & Nelson PC, [cdow@hgnlaw.com](mailto:cdow@hgnlaw.com); Allison McAdam at Hunsucker Goodstein & Nelson PC, [amcadam@hgnlaw.com](mailto:amcadam@hgnlaw.com); Eric Mroz at Hunsucker Goodstein & Nelson, P.C., [mroz@hgnlaw.com](mailto:mroz@hgnlaw.com); David Edquist at von Briesen & Roper, s.c., [dedquist@vonbriesen.com](mailto:dedquist@vonbriesen.com); Christopher Riordan at von Briesen & Roper, s.c., [criordan@vonbriesen.com](mailto:criordan@vonbriesen.com); Patrick Wells at von Briesen & Roper, s.c., [pwells@vonbriesen.com](mailto:pwells@vonbriesen.com); Russell Wilson at Ruder Ware, [rwilson@ruderware.com](mailto:rwilson@ruderware.com); Linda Benfield at Foley & Lardner LLP, [lbenfield@foley.com](mailto:lbenfield@foley.com); Sarah Slack at Foley & Lardner LLP, [sslack@foley.com](mailto:sslack@foley.com); Charles Gering at Foley & Lardner LLP, [cgering@foley.com](mailto:cgering@foley.com); Michelle Gale at Dykema Gossett PLLC, [mgale@dykema.com](mailto:mgale@dykema.com); Joseph Basta at Dykema Gossett PLLC, [jbasta@dykema.com](mailto:jbasta@dykema.com); Daniel Murray at Johnson & Bell, Ltd., [murrayd@jbltd.com](mailto:murrayd@jbltd.com); Garrett Boehm, Jr. at Johnson & Bell, Ltd., [boehmg@jbltd.com](mailto:boehmg@jbltd.com); Frederick Mueller at Johnson & Bell,

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